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No.05-1411

IN THE

Supreme Court of the United States

FREDERICK JAMES MOORE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari To The Maryland Court of Appeals

PETITIONER'S SUPPLEMENTAL BRIEF

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Petitioner Frederick James Moore files this supplemental brief pursuant to Rule 15.8 to inform the Court of three new authorities relevant to the disposition of his Petition for a Writ of Certiorari. Two more state courts of last resort have issued opinions addressing the first question presented in Moore's Petition. These new decisions add to the growing divide among state courts on the important federal question of whether an indigent criminal defendant represented by private counsel has a constitutional right to publicly funded expert assistance. Furthermore, this Court's June 26, 2006 decision in *United States v. Gonzalez-Lopez* highlights the importance of the right to retained counsel of one's choice – a right imperiled by the decision below and implicated by the growing body of state court law on this subject. All three authorities underscore the need for the Court to grant review in this case.

DISCUSSION

1. *New Mexico: State v. Brown*

In *State v. Brown*, 134 P.3d 753 (N.M. 2006), the New Mexico Supreme Court has now held that indigent criminal defendants represented by private pro bono counsel have the same constitutional right to necessary state-funded expert witnesses as defendants represented by a public defender.[1] Defendant William Brown was charged with three felonies. He retained private counsel and also applied for indigent defense services. A magistrate determined that Brown was indigent and assigned a public defender. The public defender entered an appearance but did not otherwise

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[1] This opinion was issued by the New Mexico Supreme Court on April 24, 2006, ten days before Moore's Petition For Certiorari was filed. However, the opinion was not available electronically on Lexis until May 25, 2006 or on Westlaw until June 14, 2006.

act on Brown's behalf.[2] When the case was bound over for trial, Brown's private counsel refunded his retainer and notified the court that he would represent Brown pro bono. *Id.* at 755.

Brown's counsel determined that experts were necessary for the defense and requested funds from the New Mexico Public Defender Department (the "Department"). The request was denied on grounds that Brown was not represented by the Department. Brown then petitioned the district court to order the Department to provide expert funding. Following a hearing, that request was also denied. *Id.* at 755-56.[3] However, the judge recognized the unsettled law surrounding this important issue and certified his order for interlocutory appeal.

The intermediate appellate court upheld the district court on the grounds that the district court lacked the authority to order the payment of expert fees where the defendant is represented by pro bono counsel. *Id.* at 756. The New Mexico Supreme Court reversed, basing its decision primarily on federal constitutional grounds.

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[2] Brown's private counsel was listed as the attorney of record on several subsequent documents and the court determined that Brown's private counsel had served as his counsel since his initial appearance. *Id.* at 755.

[3] The trial judge denied the request but informed Brown that if he "were to accept Department representation, he would receive attorney representation and an array of services . . . including expert witness fees; and if Brown wished to continue with private defense counsel, he would have to provide for his own expert witness fees." *Id.* at 756. The judge's effort to inform Brown of his options stands in stark contrast to Moore's case, where the record shows no effort by the court or anyone else to inform Moore of his rights, as Moore's second Question Presented addresses.

First, the court noted that "[t]he fundamental right to counsel . . . includes the right of a criminal defendant to the effective assistance of counsel . . . and the obligation of states 'to provide indigent prisoners with the basic tools of an adequate defense.'" *Id.* at 757 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) and quoting *Britt v. N.C.*, 404 U.S. 226, 227 (1971)). The court emphasized that defendants are "entitled" to "both" protections and cannot be forced to choose between these two. *Brown*, 134 P.3d at 759. The court found that the initial appointment of a public defender protected Brown's constitutional right to counsel. However, the appointment was not sufficient by itself "to ensure that his constitutional rights [were fully] protected," because "Brown [was] also constitutionally entitled to ... the basic tools of an adequate defense." *Id.*

Citing *Ake v. Oklahoma*, 470 U.S. 68 (1985), the court explained that the right to the basic tools of an adequate defense "is not contingent upon the appointment of Department counsel; it is inherent under the state and federal Constitutions." *Brown*, 134 P.3d at 757, 759. The court found that, by denying the request for expert funds, the lower court "'fail[ed] to give full recognition to Brown's constitutional right to [counsel's] representation as his *pro bono* counsel,'" and also denied Brown his "'constitutional right as an indigent [defendant] to obtain the basic tools of an adequate defense at public expense.'" *Id.* (quoting *New Mexico v. Brown*, 87 P.3d 1073, 1083-84 (N.M. Ct. App. 2004) (Vigil, J., dissenting) (alteration in original)). The court concluded that the denial of public funds for expert witnesses in Brown's defense "compromised" his constitutional rights, and provided "a strong constitutional basis" for reversing the decision below. *Brown*, 134 P.3d at 759.

Although *Brown* concerned a defendant with pro bono representation, the court's constitutional analysis

appears to support a rule mandating state assistance where the indigent criminal defendant pays for or partially pays for private representation.[4] To support its decision, the court cited cases from the "majority of" its sister states, which had ruled that "indigent defendants represented by *pro bono* or *retained counsel* [were] entitled to state funding for various defense costs, including expert witness fees." Id. at 759 (second emphasis added). Even more significantly, the court stated that "[t]reating similarly situated indigent defendants the same under the law will promote the 'fair administration of justice' and ensure that constitutional and statutory obligations are satisfied." *Id.* at 761. *Brown* correctly emphasized that the constitutional rights at issue are triggered by a criminal defendant's indigence – not by the status of the defendant's attorney. Accordingly, the application of *Brown's* constitutional analysis to indigent defendants with private counsel seems logical, if not inevitable.

2. *Washington: State v. Punsalan*

Washington v. Punsalan, 133 P.3d 934 (Wash. 2006), decided ten days after *Brown*,[5] further illustrates the unsettled nature of the important legal issues involved in Petitioner's case. Defendants Rodin Punsalan and Chayce

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[4] The court in *Brown* noted that its facts could be distinguished from a previous intermediate appellate court decision in *Subin v. Ulmer*, 36 P.3d 441 (N.M. Ct. App. 2001), where the lower court had denied expert fees to an indigent defendant represented by private counsel retained by the defendant's family. *Brown*, 134 P.3d at 758-59. The *Brown* opinion did not reach the question of whether its holding would also apply to private counsel not acting on a pro bono basis, and so the continued viability of *Subin v. Ulmer* remains unsettled.

[5] This opinion was issued on May 4, 2006, the same day Moore's Petition for a Writ of Certiorari was filed.

Arden Hanson were charged with first degree robbery and manslaughter, respectively.[6] Both defendants were found to be indigent and both were represented by private counsel retained by family members. In addition, both defendants sought funds from the public defender's office to pay for expert witnesses and both requests were denied because defendants were represented by private counsel rather than the public defender's office. *Id.* at 934-35.

The Washington Supreme Court reversed and remanded both cases. *Id.* at 936. The court noted that, under *Ake*, "[t]he Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense." *Id.* at 935 (citing *Ake*, 470 U.S. at 72). To meet this constitutional obligation, Washington Superior Court Criminal Rule 3.1 provides state funding for "'services necessary to an adequate defense.'" *Punsalan*, 133 P.3d at 935 (quoting Wash. Super Ct. Crim. R. 3.1). Because the plain language of the rule does not distinguish between appointed and private counsel, the court concluded that indigent criminal defendants represented by appointed, paid, and pro bono counsel are equally entitled to state funding for necessary expert services. *Punsalan*, 133 P.3d at 935. Although *Punsalan* analyzed a state court rule, the court recognized the constitutional issues at stake and made clear that the defendants' Sixth Amendment rights must be protected. *Id.* at 935-36 ("[The] Sixth Amendment supports 'the right to select and be represented by one's preferred attorney.'") (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

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[6] Defendants' cases were consolidated on appeal to decide the issue of state funding for expert witnesses. *Punsalan*, 133 P.3d at 935.

3. *United States v. Gonzalez-Lopez*

Finally, this Court very recently issued an opinion in *United States v. Gonzalez-Lopez*, No. 05-352 (June 26, 2006). There, the defendant was deprived of retained counsel of his choice. Slip Op. at 1-4. The Court concluded that this deprivation violated the defendant's Sixth Amendment right to assistance of counsel. Slip Op. at 6. In further concluding that the violation amounted to a structural error not susceptible to harmless error analysis, the Court explained how having counsel of one's choice affected "myriad aspects of representation":

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

Id. at 9.

The scope of this crucial right is directly implicated by the state court decisions whose disagreements the Court should reconcile by granting review in this case. Moore was denied funds for expert assistance because, though indigent, he had retained private counsel. Although the Sixth Amendment "commands . . . that the accused be defended by the counsel he believes to be best," *Gonzalez-Lopez* at 5, the decision below, and similar decisions in some other states, force defendants to choose between that fundamental right and the right to expert assistance. Requiring such a choice impermissibly narrows the right described in *Gonzalez-Lopez*.

CONCLUSION

Brown, Punsalan, and *Gonzalez-Lopez* cast into sharp relief the first important federal question presented in Moore's Petition. The two new state court opinions illustrate the continuing uncertainty among the state courts as to the scope of constitutional protections afforded indigent criminal defendants with private counsel. This Court's opinion in *Gonzalez-Lopez* emphasizes that defendants are entitled to retained private counsel of their choice, but the vitality of that right in state courts will remain in doubt until Moore's first question presented is resolved.

For the foregoing reasons, and those stated in the Petition, Moore's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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